THE REPUBLIC OF UGANDA

IN THE HIGH OURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 681 OF 2020

(ARISING FROM CIVIL SUIT NO. 413 OF 2019)

1. SENTAMU MOSES

2. AHMED SEBIE

3. MOSES AHMED

4. SALIM SEBIE

5. CASH CONNECT FOREX BUREAU :::::::::::::::::::::::: APPLICANTS

VERSUS

KENANANSI JACKLINE :: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by Notice of Motion under Section 98 of the Civil Procedure Act, Section 33 of the Judicature Act and Order 52 Rule 1 of the Civil Procedure Rules for orders that;

a) The 1st, 3rd, 4th and 5th Applicants be granted leave to file their defense out of time in Civil Suit No. 413 of 2019.

b) The costs of the application be in the cause.

[2] The grounds of the application are summarized in the Notice of Motion and contained in the affidavit in support of the application affirmed by Ms. Kanyago Madinah, a lawyer working with Aegis Advocates, wherein she states that the Applicants are lay men who were

served with a copy of a plaint in Civil Suit No. 413 of 2019 on or around 28th May 2019 and they did not know that court procedures required them to file a written statement of Defence within 15 days. She stated that by the time the law firm received instructions to defend the Applicants, the time for filing a WSD had almost elapsed. She averred that the delay was not willful and the Applicants ought not to suffer as the WSD raises several matters of law and fact which ought to be heard and resolved on merit. The WSD also raises prima facie grounds that merit serious consideration by the court with a high likelihood of success. She further averred that the Plaintiff/Respondent will not be prejudiced in any way and it is in the interest of justice and equity that leave be granted as prayed for.

[3] The Respondent opposed the application through an affidavit in reply deposed by Mubeezi Zion, a lawyer working with M/s Kakama & Co. Advocates, in which she stated that the Applicants are educated and knowledgeable persons with the ability to read and understand summons and pleadings that were duly served upon them. She averred that the Applicants merely ignored the summons and pleadings served upon them. The Applicants' lawyers acknowledge receiving process within time but ignored seeking leave to file the defence out of time. She further averred that the conduct of the Applicants' lawyers was a mere tactic intended to delay court process. She concluded that allowing the application will occasion a miscarriage of justice to the Respondent. She prayed for dismissal of the application with costs.

Representation and Hearing

[4] The 1st, 3rd, 4th and 5th Applicants were represented by Mr. Fahad Siraj and Ms. Nakirya Asha while the Respondent was represented by Mr. Kakama Simon. The deponent of the affidavit in support of the application was cross examined at the hearing. Counsel agreed to make and file written submissions, which were duly filed. I have considered the submissions of Counsel in the course of determination of the matter.

Issue for Determination by the Court

[5] One issue arises for determination by the Court, namely;

Whether the application discloses sufficient grounds for grant of leave to file a defence out of time?

Submissions by Counsel for the Applicants

[6] Counsel for the Applicant submitted that the affidavit in support and the grounds relied upon bring out sufficient reasons for grant of leave to file a defence out of time. Counsel relied on the cases of ***ABC Capital Bank Limited v A-1 Industries & 2 Others, Misc. App No. 1059/2016*** which cited the Supreme Court decision of ***Captain Phillip Ongom vs Catherine Nyerowoota, SCCA No. 14 of 2001*** where **Odoki CJ** (as he then was) summarized what amounts to sufficient cause as including a *mistake by an advocate though negligent, ignorance of filing procedure by the defendant, and illness by a party.* Counsel also cited the cases of ***Rossette Kizito v Administrator General, SCCA No. 9/1996*** to the effect that sufficient reason must relate to inability or failure to take a particular step. Counsel submitted that the Applicants are laymen not sufficiently knowledgeable in court procedure but are interested in

pursuing the case on merit. As such, the delay was not willful and the Applicants have a good defence with grounds that merit consideration on the merits. Counsel further relied on the decision in ***Andrew Bamanya vs Shamsherali Zaver, SCCA No. 70/2001*** for the submission that mistakes, faults and lapses or dilatory conduct of counsel should not be visited on a litigant and that the principle governing applications for extension of time is that disputes should be heard and decided on merit. Counsel concluded that the application was brought bonafide to enable court settle the real questions in controversy between the parties and invited court to exercise its inherent discretion and grant the orders sought.

Submissions by Counsel for the Respondent

[7] In reply, it was submitted by Counsel for the Respondent that the application has no merit as no sufficient cause has been shown or exists to warrant grant of the same. Counsel submitted that the Applicants were served with summons on 28/05/2019 and filed their defence on 18/06/ 2019 and served the Respondents on 25/06/2019 which was received in protest but the Applicants chose to leave the illegality on court record until the Respondents applied to have it struck out on 28/08/2019. Counsel submitted that in cross examination of Kanyago Madinah, the deponent of the affidavit in support, it was revealed that the Applicants know how to read and write English and that the summons had in plain English indicated the time within which to file a defence. The Applicants' lawyers had also admitted to receiving instructions when the time to file the defence had not lapsed but did not state any reasons for the delay. Counsel relied on the cases of ***Mark Graves v Balton (U) Ltd, HCMA No. 158/2008*** on the position that time

set by statutes are matters of substantive justice and not mere technicalities and must be strictly complied with. Counsel also cited the case of ***Byansi Elias & Anor v Kiryomujungu, HCCA No. 29 of 2010*** where the court stated that the ground of being laymen, ignorant of court procedures could not amount to sufficient cause to compel the trial court to set aside an ex parte judgement. Counsel also submitted that in as much as mistake of counsel should not be visited on the litigants, a busy schedule of an advocate could not reasonably amount to mistake of counsel. Counsel stated that in the circumstances, receiving instructions when prescribed time is almost elapsing cannot reasonably amount to mistake of counsel. Counsel prayed that the application be dismissed with costs.

[8] Counsel for the Applicants made submissions in rejoinder which I have also taken into consideration while determining the matter.

Resolution by the Court

[9] Under Order 8 rule 1(2) of the CPR, where a defendant has been served with a summons in the form provided by rule 1(1)(a) of Order V of the Rules, he or she shall, unless some other or further order is made by the court, file his or her defence within fifteen days after service of the summons. Under Order 51 rule 6 of the CPR, the court is empowered to enlarge time set by the rules. The rule provides as follows:

> ***"6. Power to enlarge time.***
>
> *Where a limited time has been fixed for doing any act or taking any proceedings under these Rules or by order of the court, the court shall have power to enlarge the time upon such terms, if any, as the justice of the case may require, and the enlargement may be ordered although*

the application for it is not made until after the expiration of the time appointed or allowed; except that the costs of any application to extend the time and of any order made on the application shall be borne by the parties making the application, unless the court shall otherwise order."

[10] It follows, therefore, that the court may for good cause grant extension of time within which a party can file its pleadings. The power is exercised within the discretion of the court which must be exercised judicially. It is trite law that when exercising such discretion, the court has to be satisfied that the party seeking the enlargement of time has exhibited sufficient cause for the failure to act within time. It is also settled that another underlying consideration by the court is the need to ensure that matters are heard on their merits and that disputes between parties are finally resolved.

[11] The courts have established various tests as to what amounts to good or sufficient cause to warrant the grant of leave to extend time within which to take particular steps in a matter. It is a settled legal position that sufficient reason must relate to inability or failure to take a particular step in a matter. See: ***William Odoi Nyandusi vs Jackson Oyuko Kasendi, CA Civil Application No. 32 of 2018*** and ***Rosette Kizito vs Administrator General & Others, SC Civil Application No. 9 of 1986.*** In ***Captain Phillip Ongom vs Catherine Nyero Owoto, SCCA No. 14 of 2001*** it was held that what amounts to sufficient cause includes a mistake by an advocate, illness of a party or advocate and ignorance of filing procedure by the party or their advocate.

[12] On the case before me, the Applicants have relied on grounds of ignorance of procedure on their part and mistake of counsel. It was averred that when the Applicants received the summons, they were unaware of the requirement as to time within which to act on the summons. By the time the Applicants remitted the summons to their advocates, the time was too short to enable the advocates file the WSD within the required timelines. It is further stated that it was counsel's mistake that they did not seek enlargement of time before filing the WSD that was struck out for being time barred. For the Respondents, it was stated that these facts do not establish sufficient cause and the application should be rejected.

[13] Regarding lack of knowledge of the Applicants concerning the essence of time stated in the summons, it was argued by the Respondent's Counsel that the Applicants being able to read and write English, it is not believable that they did not understand that they were supposed to respond to the summons within 15 days. I do not agree with this argument by Counsel for the Respondent. Rather I agree with the Applicants that while the statement in a summons may appear plain to a lawyer, it may not be so for a non-lawyer, even when educated. This indeed is the essence of the right to legal representation. To find otherwise would be a fetter on the right to legal representation and would directly contradict the right to access to justice. Access to justice includes having full appreciation of the court process and this includes full access to legal representation. As such, the claim by the Applicants that they did not appreciate the time element embedded in the summons served upon them is a legitimate claim. I would find this a sufficient ground for enlargement of time.

[14] Regarding the failure by the Applicants' advocates to act within time, it was explained by the deponent to the affidavit in support of the application that by the time the advocates received instructions, the time had almost elapsed and they could not get hold of the materials they needed to file the defence. It is clear that the Applicants' advocates ought to have sought leave at the time instead of filing a defence that they knew was irregular. This however only amounts to a mistake of counsel which, under the law, ought not to be visited upon the litigants. A plethora of decided cases abound on the principle that a litigant ought not to bear the consequences of default by an advocate unless the litigant is privy to the default or the default results from the failure on the part of the litigant to give the advocate due instructions. See: ***Zamu Nalumansi & Another v Sulaiman Lule, SCCA No. 2 of 1992; Mary Kyomulabi v Ahmed Zirondemu, CACA No. 41 of 1979 and Andrew Bamanya v Sham sherali Zaver, CA No. 53 of 2003*** also on the position that mistakes, faults, lapses and dilatory conduct of counsel should not be visited on the litigant and where there are serious issues to be tried, court ought to grant the application. In such cases, the court will generally consider whether the delay is one that is explainable to the satisfaction of court when determining whether to grant leave or not.

[15] It is clear in the present case that the Applicants' advocates omitted to seek leave for enlargement of time and instead irregularly filed a WSD and a counterclaim out of time. Such a mistake, even when negligent, cannot be visited on the innocent litigants. Such would constitute sufficient cause for failure to act within time and would entitle the Applicants to enlargement of time. In ***National Enterprises Corporation v Mukisa Foods, CACA No. 42 of 1997,*** the Court held

that denying a subject a hearing should be the last resort of the court. In ***Banco Arabe Espanol v Bank of Uganda [1999] 2 EA***, the Supreme Court held that the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and lapses or errors should not necessarily debar a litigant from pursuit of his or her rights.

[16] In the circumstances, therefore, the Applicants have established sufficient cause as to warrant exercise of the court's discretion to grant leave to the 1st, 3rd, 4th and 5th Applicants to file their written statement of defence out time. The application is therefore allowed with orders that;

a) The 1st, 3rd, 4th and 5th Applicant are granted leave to file their Written Statement of Defence in Civil Suit No. 413 of 2019 out of time.
b) The Written Statement of Defence shall be filed within 15 days from the date of this Ruling.
c) The costs of this application shall be in the cause.

It is so ordered.

Dated, signed and delivered by email this 31st day of October, 2022.

Boniface Wamala
JUDGE